

EXHIBIT 2

December 17, 2010 Hearing Transcript

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION

4 BRAINTECH, INC.,

5 Plaintiff/Counter-Defendant,

6 -v-

Case No. 09-10454

7 ADIL SHAFI,

8 Defendant/Counter-Plaintiff/
9 Third-Party Plaintiff,

10 -v-

11 FREDERICK WEIDINGER and
12 BRAINTECH, INC.,

13 Third-Party Defendant/Counter Defendant./

14 **MOTIONS HEARING**

15 **BEFORE HON. VIRGINIA M. MORGAN**

16 United States Magistrate Judge
17 Federal Building and U.S. Courthouse
18 200 E. Liberty Street
19 Ann Arbor, Michigan 48104

20 **(Friday, December 17, 2010)**

21 **APPEARANCES:**

22 ANNE WIDLAK, ESQUIRE
23 Appearing on behalf of
24 Plaintiff/Counter-Defendant
25 Braintech, Inc.

JAMES P. MURPHY, ESQUIRE
Appearing on behalf of
Defendant/Counter-Plaintiff/Third
Party Plaintiff Adil Shafi.

(Via Telephone)

GEOFFREY J. GREEVES, ESQUIRE
Appearing on behalf of Third-Party
Defendant/Counter Defendant Frederick
Weidinger.

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Ann Arbor, Michigan

Friday, December 17, 2010

At about 1:37 p.m.

* * *

DEPUTY COURT CLERK: United States

District Court for the Eastern District of Michigan is now in session, the Honorable Virginia M. Morgan, United States Magistrate Judge, presiding.

The Court calls case number 09-10454, Braintech, Incorporated versus Adil Shafi, et al.

Will counsel please step forward and put your appearances on the record?

MS. WIDLAK: Anne Widlak on behalf of Braintech.

MR. MURPHY: Good afternoon, Your Honor. J. P. Murphy on behalf of Adil Shafi.

MR. GREEVES: Your Honor, appearing by phone pursuant to the Court's leave, Geoffrey Greeves for third party Defendant Frederick Weidinger.

THE COURT: All right. Would you state your name again, counsel?

MS. WIDLAK: Yes. Ann Widlak, W-i-d-l-a-k, counsel for Braintech only.

THE COURT: And what firm are you with?

MS. WIDLAK: Nemeth Burwell.

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1 THE COURT: Okay, thank you. Oh, I see.

2 MS. WIDLAK: Yes, we joined the case late.

3 THE COURT: You are on the docket, but
4 you're not on the docket as the plaintiff because --

5 MS. WIDLAK: Of the --

6 THE COURT: Because you were --
7 Braintech's complaint was dismissed.

8 MS. WIDLAK: That's correct, Judge.

9 THE COURT: So you show up on the second
10 page of the docket. So we're good on that. We couldn't
11 find you, but you are fine.

12 MS. WIDLAK: All right.

13 THE COURT: Okay. Thank you.

14 MS. WIDLAK: You're welcome.

15 THE COURT: Now, today we have some
16 motions up. Let's see. We have a motion to quash
17 subpoenas, we have an amended -- that's amended also,
18 amended motion for protective order regarding third party
19 discovery. We can start with whatever you want to start
20 with.

21 MR. MURPHY: Well, they're all kind of
22 interrelated, Your Honor.

23 THE COURT: Yeah, so I have docket entry
24 61 and 62, non-party Advenovation?

25 MS. WIDLAK: I believe so.

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1 THE COURT: Is that how you say it?

2 MR. MURPHY: Advenovation, yes.

3 THE COURT: Advenovation's amended motion
4 to quash, 61, and Mr. Shafi's amended motion for
5 protective order, 62.

6 MR. MURPHY: Right.

7 THE COURT: Okay. All right. So do you
8 want to speak to those motions?

9 MR. MURPHY: Yes, Your Honor.

10 First, as you've observed, the posture of
11 this case is a little bit odd. Braintech originally
12 filed suit seeking rescision of a transaction in which
13 Braintech acquired all of the stock in my client's
14 company, Shafi, Inc., and 80 percent of a second company,
15 Shafi Innovation, Inc.

16 THE COURT: Can you hear him?

17 MR. GREEVES: I can hear him pretty well,
18 Your Honor. If he can speak up a little bit --

19 THE COURT: All right. Why don't you
20 speak from the lectern.

21 MR. MURPHY: As part of that transaction,
22 Your Honor, my client was slated to become the chief
23 operating officer of the combined entities. That
24 transaction occurred on August 12, 2008.

25 It was -- Braintech at the time was a

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1 publicly traded company and my understanding is that
2 because of that, it was a very complicated closing
3 transaction. And the closing documents are literally six
4 inches thick, all kinds of contracts, and schedules, and
5 exhibits and things like that.

6 This case proceeded all the way through a
7 year and-a-half and Braintech went out of business. Its
8 secured lender foreclosed on its assets. It went out of
9 business.

10 Counsel for Braintech at the time, a
11 lawyer associated with Pepper Hamilton, filed motion
12 papers to withdraw and the Court granted that motion.

13 When no counsel filed an appearance, the
14 complaint was dismissed. However, my client had filed a
15 counterclaim and brought in an additional party,
16 Frederick Weidinger, as a defendant on the counterclaim.
17 And so that's the posture of this case.

18 I represent now really the plaintiff. My
19 claims are two-fold -- actually three-fold. Breach of
20 the employment agreement. And that claim is strictly
21 based on the contract. It's not a wrongful termination
22 tort. It is strictly based on contract, because under
23 the contract if there was no good cause to terminate my
24 client, there is a severance package that was to be
25 awarded. That's the basis of my claim.

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1 And I concede, Your Honor, that if I
2 cannot demonstrate that there was no good cause to
3 terminate my client, then I don't have a right to recover
4 under the severance. And I think the response has
5 conceded.

6 And let me back up. After my client's
7 termination, my client formed the company Advenovation.
8 My client has been in the vision-guided software business
9 virtually all of his adult life. That's his profession.

10 After he was thrown out of Braintech, he
11 decided to get back into that profession and he has
12 worked with the other party who has not filed a motion,
13 Aptura. Aptura has developed new software code for a
14 vision guidance for robotic systems. And this is what
15 drives the cameras to pick up the -- for the robots.

16 Prior to the transaction, my client had
17 developed a proprietary software called Reliabot. It was
18 trademarked. It was owned by Shafi, Inc., the company.
19 That went to Braintech as part of the transaction.

20 So we fast forward the case all the way to
21 the last day of discovery. And immediately prior to the
22 last day of discovery, my client, Adil Shafi, gave
23 deposition testimony. He was asked repeatedly, "Are you
24 using Reliabot software code?"

25 He absolutely and steadfastly said, "No,

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1 I'm not making any use of it."

2 On the last day of discovery, these
3 subpoenas went out seeking all kinds of information about
4 Advenovation which did not become -- which wasn't formed
5 and did not become operational until after my client was
6 terminated from Braintech, and Advenovations'
7 relationship with Aptura principally in the development
8 of the new software code for New Vision Guidance
9 Software, without any credible information evidence
10 developed in the record prior to the last day of
11 discovery before those subpoenas went out.

12 And really, it's based on speculation that
13 my client is somehow making use of Shafi, Inc., and/or
14 Reliabot code, Shafi, Inc., assets and/or Reliabot code.

15 And so what we've offered to do in our
16 response is produce the new code developed by
17 Advenovation and Adil Shafi, he's the driving force
18 behind it since the termination from Braintech, so that
19 Braintech and its lawyers can compare that code to
20 Reliabot code.

21 But as far as the business of
22 Advenovation, that has absolutely no relevance to any
23 issue in this case. Now, counsel speculates in the
24 papers that perhaps Adil Shafi is somehow trading on --
25 excuse me, the assets of Shafi, Inc.

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1 There's no -- first of all --

2 THE COURT: Do you need some water?

3 MR. MURPHY: No, I'm fine.

4 THE COURT: Okay.

5 MR. MURPHY: First of all, there's no
6 evidence in the record that he's doing anything like
7 that.

8 And second of all, even if he was calling
9 on customers, former customers of Shafi, to sell new
10 software for vision guidance, that has nothing to do with
11 any claim in this case.

12 Now, there is a conversion claim, there is
13 an unjust enrichment claim. The basis of those claims
14 are that Braintech and Weidinger wrongfully converted an
15 asset that was owned by Adil Shafi, and that is his
16 company, Shafi, Inc.

17 But there is no evidence that Shafi is
18 making use of any of those assets. And basically, Your
19 Honor, the only asset that Shafi, Inc. had was the
20 software. That's what it sold to customers throughout
21 its existence.

22 And so we're willing to proffer the
23 software and let counsel examine that to their heart's
24 content. But this business about going through purchase
25 orders issued by Advenovation, after this whole

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1 transaction blew up, and even after Braintech went out of
2 business, has no relevance to any issue in this case, and
3 frankly, it's a fishing expedition.

4 Unless you have any questions, that's all
5 I have to say.

6 THE COURT: I don't.

7 MR. MURPHY: Thank you.

8 THE COURT: Ms. Widlak.

9 MS. WIDLAK: Thank you, Judge.

10 Just a few points, Judge. As Mr. Murphy
11 pointed out today, but not in his filings with the Court,
12 there are a number of claims, including conversion and
13 unjust enrichment, which are really the focus of our
14 response today.

15 The damages that Mr. Shafi seeks and that
16 he published in his Rule 26(a) filing are upwards of \$10
17 million for loss of going concern, breach of the
18 employment contract, personal liability for some debts,
19 lost opportunity costs, and damages to Mr. Shafi's
20 reputation and a conversion claim and he's seeking treble
21 damages.

22 And it's Braintech's position, as well as
23 Mr. Weidinger's, we filed a joint response, that because
24 one of the allegations, specifically in Counts Six and
25 Seven of his second amended counter-complaint, are that

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1 we stole corporate property of his and have converted it
2 to our own use.

3 It's highly germane to be able to
4 ascertain whether he in fact has possession of the
5 property he claims Braintech and/or Weidinger stole. And
6 so that's the basis -- it's really driven by his claim
7 for damages.

8 And with all due respect to Mr. Murphy's
9 characterization of his client's deposition testimony, we
10 did not find it particularly credible and we would like
11 to be able to do additional discovery to try to either
12 verify or dispute the fact that what he's saying, i.e.,
13 "I don't have possession of what you stole from me," we
14 would like to be able to verify that. So in that regard
15 we believe it's relevant to his claim for damages.

16 He testified that Mr. David Deckow
17 (phon.), who is the principal of the third party Aptura
18 Machine, he -- Mr. Shafi testified that Mr. Deckow has a
19 copy of the Reliabot source code, the original that is
20 the subject of this controversy, that he, Mr. Shafi,
21 claims we stole from him.

22 He does business very closely with Mr.
23 Deckow, and so we are eager to evaluate what Mr. Deckow
24 may possess or know about this. Mr. Deckow, by the way,
25 has no objection to our subpoena himself.

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1 But I have really four points and then
2 I'll conclude. As I noted, we believe that the subpoena
3 directed to Advenovation is relevant to these claims for
4 damages because Mr. Shafi's activities post-Braintech,
5 we'll put it that way, would impact on his allegation
6 that our client's conduct somehow harmed his ability, his
7 reputation to go forward in this robotics business.

8 Secondly, he also asserts that part of
9 these materials are attorney/client privileged, but he
10 does not specify -- didn't submit a privilege log and
11 does not specify how and why and what items would be
12 subject to the privilege. So we don't think he's
13 successfully met his burden on that.

14 Now, with regard to Aptura, the third
15 party, the case law that we cited in our brief is quite
16 clear, Judge, that Mr. Shafi does not have standing to
17 object to -- or seek a protective order disallowing
18 discovery with regard to this third party.

19 They're cited in my brief. But one case
20 is the *White Mule Company versus ATC Leasing*, reported at
21 -- well, published at 2008 WestLaw 268023.

22 Now, we've tried to be reasonable during
23 the proceedings and we would agree to a protective order
24 with regard to the third party materials. And so I just
25 offer that to the Court at this time in terms of

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1 resolving this.

2 And then as a final matter, Mr. Deckow, as
3 I indicated, has been in contact with us and has no
4 objection to providing the subpoenaed materials to us.
5 And Mr. Shafi has asserted that this meets the undue
6 burden standard, but Mr. Deckow, in one of our
7 attachments, sent an e-mail, indicated that he estimates
8 that this -- producing these materials would require
9 about one hour of management time and about three hours
10 of administrative and accounting time.

11 So we do not think that Mr. Shafi has met
12 his burden with regard to showing that it would be an
13 undue burden under Rule 26.

14 So in conclusion, Judge, we ask that you
15 deny the Advenovation amended motion to quash the
16 subpoena and also deny Mr. Shafi's amended motion for a
17 protective order disallowing the third party discovery as
18 to Aptura.

19 Do you have any questions, Judge?

20 THE COURT: Not at this time.

21 MS. WIDLAK: Okay. Thank you.

22 THE COURT: Is there anything that you
23 want to say on behalf of Mr. --

24 MR. GREEVES: Mr. Weidinger, Your Honor?

25 THE COURT: Weidinger.

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1 MR. GREEVES: Yes. This is Jeffrey
2 Greeves, Your Honor, representing Frederick Weidinger.

3 A few additional points. Aptura Machine
4 Vision Solutions was actually identified by plaintiff in
5 initial disclosures as having responsive information to
6 the extent that plaintiff claims this is kind of out of
7 left field and they're not really part of the fishing
8 expedition contest.

9 They, meaning Mr. Shafi, identified Aptura
10 as a party who had particular information about the
11 products and solutions that -- including Reliabot, that
12 Shafi, Inc. had (inaudible).

13 And, you know, we got basically the
14 identification of this entity before the depositions.
15 And once we took the depositions, it became obvious that
16 Mr. Shafi never had provided for, that he never reviewed
17 the code for this allegedly new product that he is now
18 out there marketing and then (inaudible) saying that he
19 believed it was not the same thing as what he had before.

20 The other thing, Your Honor, is with
21 regard to the timing of this issue, I think it was just
22 maybe two to three months in February of 2000 -- well,
23 February of the next year, after Mr. Shafi was
24 terminated, that he began working at Aptura in
25 marketing-type -- at Advenovation, in marketing the

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1 product. It was obvious that it took him several years
2 to develop the prior product, but that he was quickly
3 able to inherit the Advenovation Company which had been
4 set up by an undisclosed or undisclosed persons and given
5 to Mr. Shafi in exchange for releasing debts that he had
6 to those parties.

7 So I think it's very germane as part of
8 the damages claim that he claims to owe debts to these
9 parties, to allow us to investigate by proper discovery
10 the Advenovation's documents, as well as (inaudible) he's
11 marketing the code.

12 And more importantly for my client's
13 purposes, Mr. Shafi is seeking to hold Mr. Weidinger
14 responsible personally for converting the property and
15 Mr. Weidinger's entity, his new entity foreclosed on
16 Braintech assets. So it is really the (inaudible) of the
17 Reliabot software.

18 And to that extent it has the right to
19 know whether or not certain -- Mr. Shafi who is suing Mr.
20 Weidinger is now using the very property that Mr. Shafi
21 says Mr. Weidinger stole from him.

22 So what we can get would be fair and of
23 course proper discovery with the safeguards in place that
24 Ms. Widlak mentioned for those parties, such as an expert
25 to come in and analyze the Advenovation source code and

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1 determine whether or not it is substantially similar to
2 the code that was sold to Reliabot Software that Mr.
3 Shafi says he sold to Braintech. But unfortunately for
4 Braintech, kept a copy of -- or Mr. Deckow kept a copy of
5 the software, and Mr. Deckow, as parties have said here,
6 is business partners and -- or have some form of
7 independent contractor relationship at a minimum with
8 Advenovation.

9 So those are the points that I wanted to
10 bring to Your Honor's attention in reviewing this matter.

11 THE COURT: Okay. So the first part is
12 looking at the source code. Mr. Shafi has volunteered to
13 permit Weidinger/Braintech to look at the current source
14 code that he's using at his new company; is that correct?

15 MR. MURPHY: That's correct.

16 THE COURT: And when he says he's willing
17 to do that, is that to disclose that to an expert or how
18 did he envision this?

19 MR. MURPHY: Well, the suggestion than an
20 expert needs to come into the picture is brand new. That
21 has never been suggested before it came out of Mr.
22 Greeve's mouth on the phone.

23 All that has been issued as of today is a
24 subpoena to Aptura and Advenovation. And just --

25 THE COURT: For the source --

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1 MR. MURPHY: For the source code and --

2 THE COURT: But you said you don't really
3 have a problem with that?

4 MR. MURPHY: No. I will produce the
5 source code. But my problem is, there are all kinds of
6 business records now that have been generated post the
7 divorce of these business -- of the business relationship
8 in a new business venture.

9 And in my client's new business venture,
10 he has generated this new code. It's based on --

11 THE COURT: But I thought you said you --
12 it would be okay if he looked at it?

13 MR. MURPHY: Absolutely. We'll produce
14 both of them.

15 THE COURT: Both the old code and the new
16 code?

17 MR. MURPHY: My client doesn't have
18 possession of the old code, but Aptura -- and just a
19 little further background. When my client operated
20 Shafi, Inc., he engaged David Deckow, the owner of
21 Aptura, to help write the code.

22 He's a -- David Deckow is a software
23 engineer. David Deckow wrote the Reliabot code. He has
24 a copy. And I think that's appropriate in the industry.

25 So he can produce a copy of the Reliabot

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1 code and he also has possession of the new source code
2 for the new product being marketed by my client. He can
3 also produce that code. The idea that now an expert
4 needs to look at this and possibly be deposed is brand
5 new.

6 And so my original point is, we'll produce
7 all this software and they can look at it to their
8 heart's content. They need to bring in an expert, that's
9 fine. I suppose we're going to have to have some more
10 proceedings.

11 But both attorneys make reference to
12 stealing corporate property, but they've not identified
13 any other property besides the source code. And
14 actually, the property, Your Honor, was the stock that my
15 client owned in Shafi --

16 THE COURT: Well, I thought that part of
17 the reason that he was terminated, or let go, or the
18 relationship came to an end was because Braintech thought
19 that what he brought to the table, the source code and
20 the product, I guess, were worthless.

21 MR. MURPHY: That's what they thought.

22 THE COURT: And now, all of the sudden
23 they're turning around and saying, "Oh, this is the best
24 thing since sliced bread."

25 So I have a little bit of concern about

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1 these two apparently contrary positions that Braintech
2 and Mr. Weidinger are taking. Be that as it may, Mr.
3 Shafi is agreeable to produce the source code through Mr.
4 Deckow, right?

5 MR. MURPHY: Yes. And may I just clarify,
6 we don't want to produce copies of the source code. We
7 will make the source code available on a computer in my
8 office.

9 You know, the source code is -- I mean, by
10 definition, source code is proprietary and somebody walks
11 out with a copy of it -- if an expert is necessary, that
12 expert can come to my office, we'll set up the computers
13 and whoever can look at them to their heart's content.

14 THE COURT: Okay. What's wrong with that?

15 MR. GREEVES: Your Honor, we would need
16 the opportunity to test the source code in a forensic-
17 friendly environment.

18 And Mr. Murphy's office -- I've been there
19 -- is not going to be the kind of environment that our
20 (inaudible) would need to do the kinds of things he needs
21 to do to manipulate, you know, the source code to see how
22 -- if it's different from the original source code.

23 It's not something that can be done simply
24 on someone's office desk computer. This kind of
25 examination is done all the time in discovery, Your

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1 Honor, by -- you know, there are labs and people set
2 these things up. They sign nondisclosure agreements,
3 they take a copy of the data, they run the tests that
4 they need to run on the data, they generate a report and
5 the data is either destroyed or returned to the other
6 party.

7 There's no reason in the world to think
8 that a competent and scrupulous third-party forensic
9 engineering outfit or software code outfit would not be
10 able to comply with that.

11 And there's no reason to think that if
12 they go to Mr. Murphy's office and do it there that
13 they're going to be able to do the kind of investigation
14 they need to do. I mean, certainly as a first step, I
15 think that offer is better than the last offer we got
16 which was for Ms. Widlak and I to come to the office to
17 look to at it, but I certainly don't know anything about
18 machine code.

19 THE COURT: Well --

20 MR. GREEVES: But the notion that we need
21 to do this dancing around the issue, is -- will simply be
22 ended if the Court will give us the opportunity in a
23 reasonable period of time to conduct an inspection and
24 generate a report and determine whether the operations
25 and machine codes are substantially similar to that which

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1 Mr. Shafi said he sold to Braintech.

2 It shouldn't be that complicated and it's
3 done all the time, Your Honor.

4 THE COURT: Okay, all right. I appreciate
5 that.

6 On the other hand, your subpoena said
7 produced them at Nemeth Burwell, another lawyer's office.
8 So what the heck difference does it make? I mean, that's
9 what you're subpoena said.

10 MR. GREEVES: But it says Nemeth -- oh,
11 yeah, a copy so that we can have it forensically examined
12 by someone not at Nemeth Burwell, but outside of -- you
13 know, outside of their office.

14 THE COURT: You didn't say that.

15 MR. GREEVES: Well, we haven't, again,
16 identified the person that is going to be doing the work
17 either.

18 THE COURT: Well, how do we know that that
19 person doesn't have a conflict?

20 MR. GREEVES: I suppose we could give Mr.
21 Murphy the name of the person that we're going to use so
22 that he can determine for himself whether that person
23 would be acceptable and/or has a conflict by consulting
24 with his client.

25 THE COURT: So why didn't you try to

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1 discuss this and make these offers? You know why?
2 Because I let you appear by phone.

3 And this is why we don't let people appear
4 by phone, because of the fact that if you had had to come
5 here, you would have sat down and you would have worked
6 it out.

7 And you would have developed an
8 appropriate protocol and provided it to an appropriate
9 expert under procedures that would have protected the new
10 source code. And now, instead, you're just here and you
11 guys are working it through with me and that's not really
12 how it's supposed to work.

13 MR. MURPHY: May I point out that I
14 offered to produce this weeks ago? I offered to produce
15 the software exactly as I'm offering today. It's in my
16 papers.

17 THE COURT: And if that wasn't acceptable,
18 then you should have suggested an alternative protocol
19 and gone forward on that, because yes, I know that it's
20 done all the time. We have people do it all the time.

21 And they don't have these motions all the
22 time because they work it out. But when we let people
23 appear by telephone there is not that same interest in
24 working it out.

25 So he's offered to produce the source

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1 code. You need to develop a protocol, identify the
2 expert just to make sure, because it is a small industry,
3 that this is not somebody who has had previous
4 relationships in the past that might be adverse to Mr.
5 Shafi and go from there.

6 But, yes, you can have the source code in
7 an appropriate forensic environment, subject to a
8 protocol to be agreed upon between counsel.

9 MR. MURPHY: Thank you, Judge.

10 THE COURT: But I'm telling you, this is
11 pretty much what you could have done without continuing
12 this motion.

13 So to the extent that Nemeth Burwell or
14 Washington, D.C. counsel think that somehow you're
15 entitled to money for this, forget about it. You could
16 have done this ahead of time. Okay.

17 So that -- the motion to quash subpoenas
18 is granted in part and denied in part. Source code can
19 be produced subject to a protocol to be agreed upon
20 between counsel. Okay? You don't have a problem with
21 that, do you?

22 MR. MURPHY: No, Your Honor.

23 THE COURT: Okay. Now, the source code
24 wasn't the only subject of the subpoena.

25 There were a lot of other documents,

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1 communications, purchase orders, brochures, blah, blah,
2 blah. Do we have a problem with any of the other items?

3 MR. MURPHY: Yes, Your Honor. All of
4 these things --

5 THE COURT: All of the other items.

6 MR. MURPHY: All of these things came into
7 existence after the breakup between my client and
8 Braintech. Many of them came into existence after
9 Braintech went out of business. This is all
10 post-Braintech activity. This has nothing to do with
11 property.

12 And as I said earlier, no one has
13 identified any other property besides the source code
14 that my client supposedly has. And by the way, I will
15 also point out that I have had, since the start of this
16 case, 83 boxes of business records in my office, which
17 constitutes the business records of Shafi, Inc.

18 And I represent as an officer of the court
19 that they have been in my office since the start of this
20 case. I have offered them. They have been examined by
21 the attorneys. And no copies have been made.

22 And just to explain the reason why I have
23 them is that after this transaction was closed, Mr.
24 Weidinger and Braintech had no interest in taking
25 possession of them. So I have them. And I will keep

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1 them until somebody wants to come and look at them again.

2 THE COURT: These are the documents from

3 --

4 MR. MURPHY: Shafi, Inc., the company that
5 was acquired.

6 THE COURT: The pre-Braintech company?

7 MR. MURPHY: Yes. I have none them post

8 --

9 THE COURT: All right. Why do you think
10 you need the post-Braintech documents?

11 MS. WIDLAK: Judge, as I noted, we believe
12 that it is germane to his claim that Braintech and
13 Weidinger's behavior has hurt his ability to go forward
14 and has harmed his reputation, that he's lost
15 opportunities.

16 And by examining the nature of his
17 activities, it's -- it appears that he's actually engaged
18 in very robust business activities --

19 THE COURT: All right. Well, let me ask
20 you this. Is it not his burden to prove that he was
21 damaged?

22 MS. WIDLAK: It is. But I think we --

23 THE COURT: Is it not his burden to
24 produce documents that would show sales A, sales A minus,
25 Y, letters, communications?

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1 Isn't this all his burden to produce it?
2 And if he doesn't produce it, then he has no evidence of
3 his damages.

4 Is that your burden, counsel?

5 MR. MURPHY: It would be my burden if I
6 had a claim for lost reputation. But there's no claim
7 for lost reputation in this case.

8 There is anecdotal testimony from Adil
9 Shafi that this transaction and the breakup has hurt his
10 reputation in the business, but we don't have a claim for
11 lost reputation.

12 THE COURT: So there you go.

13 MS. WIDLAK: My understanding is that was
14 an element of his damages, Judge.

15 THE COURT: He --

16 MR. GREEVES: Your Honor, for that point,
17 one of other things that Mr. Shafi has claimed as his
18 damages are the debts allegedly that he has had to pay
19 back to third parties, debts that reverted to him as a
20 result of Braintech being unwilling, or I guess unable to
21 pay those debts according to Mr. Shafi.

22 And, you know, I mean that hasn't really
23 been supported by any evidence, other than testimony that
24 Mr. Shafi -- that he says there's certain debts he pays.

25 We're entitled to have the documentation

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1 that goes along with that debt schedule that shows, for
2 example, that he made payments to the IRS, that he made
3 payments to the bank that was loaning him the money.

4 It's those kinds of things -- while it's
5 nice to say that he may fall on his sword at trial and
6 not claim those things anymore, that's exactly the
7 purpose of discovery is to allow him to get proper
8 discovery of things to allow us to test those assertions
9 so this doesn't become a trial by ambush for documents
10 that we haven't seen yet.

11 MR. MURPHY: Those kinds of things are not
12 in the list of documents to be produced by the subpoena.

13 My client has testified that he, in fact,
14 has personal liability to certain debts that Braintech
15 agreed to pay as part of the transaction. But I've never
16 been asked to produce evidence that my client has paid
17 those debts. That evidence exists --

18 THE COURT: Well, quite frankly I would
19 think they would come under 26(a)(1) relevant to a claim
20 or defense. But --

21 MR. MURPHY: My client has testified that
22 he has paid --

23 MR. GREEVES: I mean, this is his only
24 employment, Your Honor, is Advenovation. So they're
25 bound -- I mean, he is Advenovation and Advenovation is

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1 him.

2 THE COURT: Yeah, but you --

3 MR. GREEVES: We've spent hours in
4 depositions trying to figure out, you know, who took on
5 what debt and who got what shares resulting from the sale
6 of the Advenovation -- you know, or (inaudible) the
7 Advenovation shares to various people who are listed on
8 the Braintech dep schedule. It would be a lot easier if
9 we were able to get that information.

10 THE COURT: Yeah, but that's not what
11 you're asking for in the subpoena. You're asking for
12 purchase orders. You're asking for W2s, 1099s,
13 employment applications. You're asking for
14 communications between the two companies.

15 You're not asking for anything that
16 supports the debt issues that you two have just been
17 discussing. If you wanted that, I would give it to you.
18 But that's not what you're asking for; salary, benefit
19 distribution, sales commissions, any type of
20 remuneration.

21 MR. GREEVES: Exactly, Your Honor. And if
22 I may give you an example, part of the reason that is
23 important is because of Mr. Shafi's claim that people are
24 levying on his salary, and on his assets and all this
25 other stuff to pay these debts.

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1 THE COURT: Well, if you'd asked for --

2 MR. GREEVES: (Inaudible) -- in those
3 records, Your Honor.

4 THE COURT: Well, if you'd asked for
5 levies, if you'd asked for bills, if you'd asked for
6 payments to the IRS, I'd say yeah, you didn't ask for
7 that. So the rest of it's denied.

8 You're still in discovery. You can issue
9 a new subpoena or you can sit down and come up with an
10 amendment to your Rule 26(f) discovery plan, because I
11 think if he says that, he does need to have evidence of
12 it. And if it's not produced in some kind of reasonable
13 time that you agree on or before the close of discovery,
14 then he's going to be subject to a motion in limine to
15 preclude it, or a motion to dismiss those claims or
16 you're going to need to dismiss those claims unless you
17 want to go forward and be sanctioned for failure to
18 produce evidence, or summary judgment or partial summary
19 judgment or something like that.

20 But the subpoena here is overly broad
21 because it does not ask -- it doesn't ask for the things
22 that you've identified, which seem to be appropriate
23 discovery. But they're not the things that are asked
24 for, so --

25 MS. WIDLAK: Thanks, Judge.

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1 THE COURT: -- I'm denying that part.

2 MR. MURPHY: Thank you, Your Honor.

3 THE COURT: The rest of the motions?

4 MR. MURPHY: I think that covers it.

5 THE COURT: Covers everything? There's an
6 amended motion for a protective order.

7 MR. MURPHY: Well, as I said, they're
8 intertwined. The protective order was filed by Adil
9 Shafi, the defendant/counter-claimant in this case.

10 The motion to quash was filed by
11 Advenovation, but they're --

12 THE COURT: Okay. So we've addressed all
13 the relevant issues?

14 MS. WIDLAK: Yes. With regard to the
15 motion for a protective order disallowing any discovery,
16 any subpoena as to the third party, we do submit to the
17 Court that the cases are very clear that a person like
18 Mr. Shafi has no standing to assert that motion and we
19 ask that it be denied on that ground.

20 THE COURT: The amended motion for a
21 protective order. You mean to --

22 MS. WIDLAK: It was, as I understand it,
23 Judge, a protective order that would disallow Braintech
24 and Weidinger serving this subpoena on David Deckow's
25 firm, the third-party, Aptura.

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1 And we're saying he doesn't have any --
2 Mr. Deckow has no objection to releasing the materials
3 and we don't believe Mr. Shafi or Advenovation has
4 standing to make the motion in the first instance. So
5 that would be our position.

6 THE COURT: So these are the same
7 materials you're requesting from Mr. Deckow?

8 MS. WIDLAK: Not the same. They go to his
9 activities and his relationship with Mr. Shafi. Perhaps
10 some of them overlap, Judge, so I should look at them
11 more carefully.

12 THE COURT: Well, if he doesn't have a --
13 if they're not -- I'm not sure what the relationship is
14 between the parties.

15 If they're proprietary to Mr. Shafi or
16 Aptura, which is his company, and I guess Advenovation's,
17 if they're proprietary, and he has an interest in that
18 proprietary information, then they don't have to be
19 produced.

20 MS. WIDLAK: Would the Court consider
21 ordering them to be produced subject to a protective
22 order? Because we are more than willing to enter into a
23 protective order that would limit the use to our
24 examination in this litigation and --

25 THE COURT: I really don't understand the

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1 relationship between Mr. Deckow and Mr. Shafi.

2 Are they partners? I mean -- and who are
3 you subpoenaing, just --

4 MS. WIDLAK: Just Mr. Deckow and Aptura's
5 materials; not Mr. Shafi's. I mean, it's directed to
6 that entity. And it's my understanding, Judge, and I'm
7 -- I'm fairly confident of this, that Mr. Shafi is a
8 subcontractor to Aptura.

9 THE COURT: If he's given them things --

10 MR. MURPHY: Your Honor, I think I can
11 shed light on this relationship.

12 THE COURT: Okay.

13 MR. MURPHY: In his new business, Mr.
14 Shafi, with Advenovation, is developing software. He has
15 contacted Aptura to develop the source code for that
16 software.

17 So my position is that Advenovation has
18 standing to --

19 THE COURT: Because the things that
20 they're asking for are really the property of your
21 person?

22 MR. MURPHY: Exactly. And my client, Mr.
23 Shafi, also has standing to make the same argument under
24 the Rule 26 motion for a protective order.

25 THE COURT: I think that that's true in

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1 this limited instance. I also think that it wouldn't --
2 I think you're probably 100 percent correct, and Mr.
3 Deckow doesn't care.

4 Because it's been my experience in the
5 past with people who write software code that they don't
6 draw distinctions between what's theirs and what's
7 somebody else's. And it's all just there.

8 So what I'm going to do is, I'm going to
9 quash both of these subpoenas except for the source code
10 production.

11 You can do new subpoenas and you will have
12 to produce evidence of debt or whatever is relevant to
13 this. And with respect to the company, I suppose those
14 things would also apply to those companies if the
15 companies are making payments or liable for debts.

16 MR. MURPHY: I guess I need to comment on
17 that. There's been no testimony that Mr. Shafi's company
18 is making payment on debts that he is now personally
19 liable for.

20 And just by way of background, there were
21 unpaid FICA and FUTA taxes at Shafi, Inc., before the
22 transaction.

23 As part of the transaction, Braintech
24 agreed to assume that debt and pay it off over a course
25 of time. Because Braintech made one or less payments on

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1 that debt, it reverted back to Mr. Shafi. So Mr. Shafi
2 has been paying creditors, including secured creditors,
3 to which he had a guarantee at Comerica Bank.

4 Now, in the course of discovery, there has
5 been not a single document request asking for any
6 documents associated with payments that Mr. Shafi has
7 made to debt that was assumed by Braintech.

8 He has testified that he has made those
9 payments and he has even given numbers. Discovery closed
10 on the date these subpoenas were issued.

11 THE COURT: That's true.

12 MR. MURPHY: So I mean, I'm happy to
13 produce the evidence. And in fact, I'll bring it to
14 trial, but there's been no discovery request asking for
15 that detail. And if I'm obligated to supplement my Rule
16 26 disclosure, I will be happy to do that.

17 THE COURT: All right. Why don't we treat
18 this as supplementation for the Rule 26 disclosures, --

19 MS. WIDLAK: Thank you, Judge.

20 THE COURT: -- rather than extend
21 discovery and quash the subpoenas except for the source
22 code issues.

23 MS. WIDLAK: All right, Judge. Thank you
24 very much.

25 THE COURT: Okay. And then we're done.

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1 MR. MURPHY: Thank you, Your Honor.

2 MR. GREEVES: Thank you for your time,

3 Your Honor.

4 THE COURT: Thank you, bye. We'll do the

5 order.

6 MS. WIDLAK: Thanks, Judge.

7 (Court in recess at 2:17 p.m.)

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C E R T I F I C A T I O N

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I certify that the foregoing is a correct transcript from the digital sound recording of the proceedings in the above-entitled matter and has been prepared by me or under my direction.

\s\Marie J. Metcalf

02-12-11

Marie J. Metcalf, CVR, CM

(Date)